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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I

GENERAL STATEMENT

Petitioners, Edward S. Cannon and Charles Smith, were indicated in the United States District Court for the Southern District of Texas, with two other defendants, for alleged violations of the Customs laws, and the Marihuana

Act, in four counts. The first count charged a conspiracy to unlawfully import marihuana, count two its unlawful importation, count three its unlawful receipt and concealment after importation, and count four its unlawful acquisition within the United States.

Petitioner Cannon filed a motion to suppress the evidence obtained by the search made by Customs agents of his automobile on the ground that such search was made without warrant authorizing the same, or by virtue of any warrant or process of law, and not made as incident to a lawful arrest and was in violation of his constitutional rights. (R. 14-17.) This motion was overruled, and a jury was then empanelled, and the case proceeded to trial. The evidence obtained by virtue of the search and seizure of ptitioner Cannon's automobile over his objection duly made, was offered in evidence, and which established that the agents found in the closed trunk of his automobile, a sack containing approximately thirty-nine pounds of marihuana. The prosecution relied upon this evidence to sustain all charges against petitioners. That without such evidence, none of the charges could have been sustanied, and as we feel confident that such statement will be conceded by Respondent, statement of the evidence of the trial therefore will be omitted herein.

Motions for judgments of acquittal on all counts were made on behalf of all defendants, and were overruled. That, as the conspiracy count charged that the object and purpose of defendants was to obtain marihuana in Mexico, unlawfully import it, and to thereafter transport it to New Orleans, Louisiana, to unlawfully sell same, and

as the evidence to sustain said charge was the possession by petitioner Cannon of the marihuana seized in his car, and as count four charged all defendants with the unlawful acquiring of said marihuana within the United States, at the close of the evidence, all defendants moved to compel the prosecution to elect which of the two counts it would rely for conviction (R. 239). Such motion was overruled. The jury found petitioners guilty under count one which charged the conspiracy to import the marihuana into the United States, and under count four which charged the unlawful acquiring of the same marihuana within the United States, and not guilty under counts two and three. The two other defendants were found not guilty on all counts. (R. 241.) Petitioner Cannon was sentenced to serve two years imprisonment on count one and eighteen months on count four to run consecutively, making a total term of forty-two months imprisonment (R. 243). Petitioner Smith was sentenced to serve two years imprisonment on count one and two years imprisonment on count four to run consecutively, making a total of four years imprisonment. (R. 244.)

II

STATEMENT OF FACTS AS TO MOTION TO SUPPRESS EVIDENCE

Petitioner Cannon testified that he was driving his automobile from Laredo, Texas, on a public highway in the direction of San Antonio, Texas. That he was forced to stop by Customs agents, and they forcibly searched his automobile, and in the trunk thereof, they found and took into their possession, a sack containing marihuana, and

then arrested him, (R. 21). One of the Customs agents who made the search testified that they saw petitioners and the two other defendants, cross the official bridge crossing from Mexico into Laredo, Texas. They saw them all get into a Mercury Sedan, and drive away. They followed them, and saw petitioner Cannon get out, and get into another car, which was a Studebaker Sedan, and drive in the direction the Mercury drove. They followed both cars, and because a train passed between the Mercury Sedan and their car, they lost sight of it, (but continued to follow the Studebaker, and followed it to certain tourists courts at Laredo, known as the Cactus Courts, where Cannon parked the car and went into one of the cabins. The officers waited across the road from the courts in their car, and later saw the Mercury driven by petitioner Smith come out from the courts. They followed it, but the court, over objection, refused counsel for petitioner Cannon permission to develop that they later stopped it, searched it, and found nothing, which the court thought immaterial (R. 29-30). That upon returning to Laredo, the officers recognized petitioner Cannon passing them in the Studebaker, and they turned around, signalled him to stop, searched the car, and forcibly opened the trunk in the rear, and therein found a sack containing marihuana. They then arrested petitioner Cannon (R. 32). The officers did not have a search warrant or a warrant of arrest. The officer testified that the reason of the search was that they had information petitioners were to arrange the purchase of marihuana in Mexico. Upon cross-examination, counsel for petitioner Cannon sought information as to the source of the alleged information. Government counsel objected thereto as being immaterial, and the court sustained the objection. (R. 26.)

It was about eleven hours before the search that they had the alleged information, and a United States Commissioner was available. (R. 33.)

III

ERRORS URGED IN COURT OF APPEALS

The substance of the errors urged in the Court of Appeals, briefly stated, is as follows:

1. The District Court erred in overruling petitioner Cannon's motion to suppress on the ground that the search was unlawful and not based upon probable cause, and was in violation of petitioner Cannon's rights under the Fourth Amendment to the Constitution of the United States.

2. The District Court erred in refusing to permit petitioner Cannon to examine the officer as to the identity of his informer, and which action of the court denied petitioner Cannon due process of law, particularly a deprivation of his right under the Sixth Amendment.

3. That the District Court erred at the close of the evidence in overruling defendants motion, requiring an election between counts one, the charge of conspiracy to import marihuana into the United States and the unlawfully acquiring of the same marihuana within the United States charged in count four.

4. That as the evidence obtained by the unlawful search of petitioner Cannon's automobile, was relied upon to convict all defendants, and without which evidence, none of the counts against any of the defendants could be sus-

tained, the District Court erred in overruling the motion of all defendants for judgment of acquittal on all counts.

IV

ACTION OF THE COURT OF APPEALS AND HOLDINGS BELIEVED TO BE ERRONEOUS

The Court of Appeals held as follows:

1. That the information which the officers had which they believed was reliable, "was sufficient in itself to justify the search."

2. That in addition to this information, the circumstances made the search unreasonable.

It is respectfully submitted that the circumstances without the hearsay information, fails to show probable cause to believe that marihuana was being transported in petitioner Cannon's automobile, and that there was therefore, no probable cause for the search without a warant and therefore the search and seizure was in violation of the Fourth Amendment to the Constitution of th eUnited States.

3. That the District Court did not err in refusing disclosure by cross-examination of the informer, especially when the alleged information was, as testified by the officer, the reason of the search.

It is respectfully submitted, that depriving petitioner Cannon of his right to cross-examination of the officer as to the source of his alleged information, thus precluded the Court from determining whether the information was re-

ceived, and whether the officer was justified in believing reliable, and deprived petitioner of due process of law.

4. The indictment charged in the alternative, that is, count one charged defendants conspired to obtain and procure marihuana, and import it, and thereafter transport it to destination to sell, and in furtherance thereof one of the defendants was transporting it (Overt Act 13, R. 10-11), and count four charged defendants with having unlawfully acquired the same marihuana within the United States, the court erred in holding it was not error to have overruled the motion of defendants at the close of the evidence, to elect between counts one and four.

It is respectfully submitted petitioners were convicted of acquiring the same marihuana in Mexico and also i nthe United States, and sentenced upon each charge to run consecutively. Only one of the alleged crimes petitioners could be guilty of not both, and such required an election at the close of the evidence.

5. That, as the evidence relied upon to convict both petitioners, was secured in violation of one's Constitutional rights, the court erred in holding that the District Court did not err in overruling motion for judgment of acquittal on all counts as to both petitioners.

V

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully show to the Honorable Court

that a Writ of Certiorari should be issued directing the removal of the cause to this Court, because:

1. The holding of the Court of Appeals that an officer who makes a search of an automobile or, as may be, other property, upon information received, cannot be examined as to the source of the information, is in conflict with the following authorities:

United States v. Keown, 19 F. Supp. 639;

United States v. Bluh, 45 F. (2d) 903.

And such holding deprives an accused person the right to cross-examine on material facts every witness who testifies against him, and deprives the accused of his right under the Sixth Amendment to the Constitution of the United States, "to be confronted with the witnesses against him."

United States v. Keown, 19 F. Supp. 639;

State v. Bigham, 133 S.C. 491, 131 S.E. 603.

The holding of the Court of Appeals that to avail a defendant the right to cross-examine an officer as to the source of his information, a defendant must show that such disclosure is necessary to predicate his defense on the merits, thereby refusing a defendant such cross-examination in a hearing before trial on a question raised in defense, that the search was unlawful, and the evidence obtained thereby, should be suppressed, and especially when the subject matter inquired of is material to the question for the court to determine, that is, did probable cause exist to authorize

the search, is a decision to an important question of general law in a way probably untenable, and in conflict with the above cited cases. This question has never been decided by the Supreme Court of the United States and said question is of great general and public interest, not only to the petitioners, but to the Government as well.

And as to such holding, and which the Court in *United States v. Keown, 19 F. Supp. 639*, held to the contrary, the court with respect to the importance of a controlling decision thereon, said:

> "The question which the court is called upon to decide in this case involves important principles, and I am deciding it in such form that my decision may be promptly reviewed by a higher court, and a uniform rule of law established for the guidance of executive officers. The field of administrative law is necessarily growing with great rapidity under our complex civilization, and the courts should establish with certainty what information in the hands of governmental departments is closed to judicial scrutiny."

2. The holding of the Court of Appeals that information received by the agents was of itself, sufficient, to justify the search, is, we submit, contrary to what this Court held as sufficient to constitute probable cause, in *Carroll v. United States, 267 U.S. 132*, and cases of this Court cited therein, that the good faith of the officer must be grounded on facts within his knowledge, and not merely grounded upon hearsay. And is in conflict with the Seventh Circuit in *Lawson v. United States 7th Cir., 9 F. (2d) 746*,

wherein that court after citing *Carroll v. United States, supra,* said:

That "probable cause must be determined by the existence of facts known to the officer before, not after, the search." (p. 746.)

And in conflict with the Fourth Circuit in *Elrod v. Moss, 4th Cir., 278 F. 123,* wherein the court said:

> "Under the federal as well as the state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

3. The holding of the Court of Appeals that in addition to the information received by the officers, there was probable cause to believe that marihuana was being unlawfully transported by petitioner Cannon, and that the search of his car and seizure of contents thereof was not unlawful, is in conflict with the holdings of this Court that the facts known to the officer must be such as to warrant a prudent man of reasonable caution in the belief that petitinoer Cannon was unlawfully transporting marihuana, which facts known to th eofficer, by themselves, were insufficient to establish. *Carroll v. United States, 267 U.S. 132.*

4. The holding of the Court of Appeals that the District Court did not err in overruling a motion to elect between the conspiracy count charging as the object thereof, to procure marihuana in Mexico, import it, and thereafter

transport it to a certain destination to sell, and in furtherance thereof, one of the defendants to the alleged conspiracy, was transporting marihuana in the United States, and a count charging the acquisition of the same marihuana within the United States, is a decision to an important question of general law in a way probably untenable.

Your petitioners present herewith specifications of errors and brief showing more fully their views upon the questions of law involved in the transcript of the record in the United States Circuit Court of Appeals.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case number and style on its docket, "Edward S. Cannon and Charles Smith, appellants, vs. United States of America, appellee, Number 11,675," to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals is not reported. It is included in the record at page 251.

II

JURISDICTION

1. The date of the judgment to be reviewed is December 27, 1946. Thereafter a rehearing was filed and was denied January 22, 1947.

2. The statutory provision to sustain jurisdiction of this Court is Section 240 of the Judicial Code as amended appearing in Title 28 U.S.C.A. 347.

III

STATEMENT OF THE CASE

The statement of the case has already been made in the petition, Articles I and II, and to avoid repetition we refer thereto.

IV

SPECIFICATION OF ERRORS

The judgment of the Court of Appeals and the Trial Court should be reversed and the cause remanded for a rehearing upon the following grounds:

1. The Trial Court should have sustained petitioner Cannon's motion to suppress and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so, for the following reasons:

(a) The alleged information of the officer could not be considered in determining whether probable cause existed to warrant the search, for the reason cross-examination as to the source of such information was denied petitioner Cannon.

(b) The alleged information was merely hearsay, and did not of itself constitute probable cause to warrant the search.

(c) The facts within the knowledge of the officers was not sufficient to warrant a reasonable cautious man to believe that marihuana was being transported in the car of petitioner Cannon.

2. The refusal of the Trial Court to permit petitioner Cannon cross-examination of the officer as to the source of his alleged information, deprived petitioner of his right under the Sixth Amendment to the Constitution of the United States "to be confronted with the witnesses against him," and secondly, the Court should have been given such information so that it might have determined whether or not the witness had reasonable cause to believe the information, and whether the information was reliable, and also to afford petitioner Cannon opportunity to impeach the witness.

The Court of Appeals erred in failing to reverse and remand the cause because of error of the Trial Court in refusing to permit said examination as aforesaid.

3. The Trial Court erred in overruling defendants motion to require the prosecution to elect whether it would rely upon the alleged agreement of defendants as charged in the conspiracy count to import marihuana from Mexico and also to have unlawfully acquired the same marihuana in the United States, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so.

4. That as the evidence relied upon for conviction of both petitioners consisted of the evidence obtained by virtue of the unlawful search of the automobile driven by

petitioner Cannon, the Trial Court erred in overruling defendants motion made at the close of all evidence for judgment of acquittal of all defendants on all counts of the indictment, and the Court of Appeals erred in failing to reverse and remand the cause because of [redacted] such error.

V

ARGUMENT

A. Motion to Suppress Evidence.

Petitioner Cannon was driving an automobile on the public highway. He did not cross the Mexican border in the automobile, and which automobile never crossed the border. He was driving at a moderate rate of speed, and no act on his part gave any reason to warrant a reasonable prudent man that marihuana was in his automobile. The officers solely made the search "with the hope of securing evidence upon which to indict and convict" petitioners. *Taylor v. United States, 286 U.S. 1, 5.* That, as said by this court in *Carroll v. United States, 276 U.S. 132, 154:*

> * * * those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The officer testified that they made the search because he had information that petitioner Cannon, petitioner

Smith and another party, were to arrange the purchase of marihuana in Mexico. This solely being hearsay, was not of itself, as the Court of Appeals held, sufficient to constitute probable cause to warrant the search. Such holding is contrary to what this court said in the *Carroll* case as necessary to constitute probable cause, and its holding therefore is contrary thereto. In the *Carroll* case this Court referred to its holding in the case of *Director General v. Kastenbaum, 263 U.S. 25*, and cited therefrom as follows:

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which, in the judgment of the court, would make his faith reasonable." 267 U. S. 132, 161, 162.

The holding of the Court of Appeals herein is also in conflict with Seventh Circuit in *Lawson v. United States, 7th Cir., 9 F. (2d) 746*, wherein the court said:

> "* * * probable cause must be determined by the existence of facts known to the officer before, not after, the search." (p. 746.)

And, also in conflict in *Elrod v. Moss, 4th Cir., 278 F. 123* wherein the court said:

> "Under the federal as well as state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

That while information may be considered by an officer in determining probable cause, such information must be confirmed by facts personally known to the officer before he makes the search. This appears clear by the decision of this Court in *Carroll v. United States, supra,* and the Court of Appeals herein has apparently given an erroneous interpretation of that decision, cited in its opinion.

That personal knowledge of the officer is essential to constitute probable cause as the *Carroll* case apepars to hold, and as is so construed by other lower federal courts. In *United States v. Allen, 16 F. (2d) 320,* the court cited the Carroll case, and referred to the facts therein, as follows:

> "The facts in the Carroll case, which led the Supreme Court of the United States to the conclusion that this rule had been met, and the search and seizure in that case was justifiable, showed that the prohibition officers, who made the seizure, some time prior to that time had a conference with the defendants Carroll and Kiro and arranged to purchase from them three cases of whisky. The defendants advised that they would go and get the liquor; they went and returned, or one of them did, and said he could not get the liquor that night. The defendants came to this conference in an Oldsmobile roadster, which was seen by the prohibition officers, and the number of the license tag was taken by them.
>
> "About two months later these same prohibition agents passed this same car, bearing the same license number, on a public highway going

westward, presumably from Detroit. The same men who agreed to sell the liquor at the previous meeting in Grand Rapids were in the automobile, and the court held that these officers, seeing and knowing the occupants of the car, knowing the car by the license tag which it bore to be the same car which said occupants used at the time of the agreement to furnish liquor in violation of the law, were justified in believing the car was being used to unlawfully transport intoxicating liquor, and were justified in searching and seizing same without a search warrant.

"Do the facts in the instant case measure up to the rule laid down in the Carroll Case? I do not think so. They show that the seizing officers had no personal knowledge whatever of the alleged unalwful transportation of liquor in the car seized; that they acted upon information (the source of which, or the reliability of which, was not disclosed) that a Studebaker sedan car, with blue headlights and a driving light in the center, would be, or might be, used on this road at the time in question for the unlawful transportation of liquor."

The facts within the knowledge of the officers in the nistant case, were in substance, as follows:

They saw petitioners and two others cross the official bridge from Mexico and get into an automobile and drive off. The car later stopped and petitioner Cannon got out and got into a car parked at a garage, and drive in the direction of the other car, and to certain tourist courts. Later petitioner Smith drove out from these courts, the officers followed him, and on returning recognized peti-

tioner Cannon passing them on the highway driving at a moderate rate of speed. They turned around, drove alongside of his automobile, compelled him to stop, forcibly searched his car, and found therein a sack of marihuana, and then arrested him. Those facts certainly do not measure up to the facts in the *Carroll* case, and the holding of the Court of Appeals that such facts alone constitute probabel cause, is certainly extending the ruling of this Court in the *Carroll* case far beyond that intended.

B. In depriving petitioner Cannon cross-examination of the officer as to the source of his alleged information upon which the search was instituted, deprived him of his right under the Sixth Amendment, "to be confronted with the witnesses against him."

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." Petitioner Cannon was charged with criminal violations, and the issue raised in the criminal proceedings involved the question whether the evidence secured by reason of the search of his car was lawfully acquired and admissible against him in the trial. The proceeding to suppress the evidence was ancillary to a criminal prosecution of Cannon. Such proceeding therefore could not have been determined by the court on the testimony of witnesses out of the presence of Cannon. The requirement of the personal presence of the witnesses is to afford the accused opportunity to cross-examine the witnesses against him. As to such a provision in the State Constitution of South Caro-

lina, the Supreme Court of that state, in the case of *State v. Bigham, supra*, said:

> "Article 1 Sec. 18 of the State Constitution provides:
>
> "In all criminal prosecution the accused shall enjoy the right * * * to be confronted with the witnesses against him."
>
> "This constitutional provision is generally held to require the personal presenc eof the witness so that the accused may be enabled to cross-examine him. 12 Cyc. 543, 22 C J 432, notes; 14 Ency. of Ev. 578; Ralph v. State, 124 Ga. 81, 52 S. E. 298, 2 L.R.A. (N.S.) 509, 4 Ann. Cas. 501; Territory v. Curran, 23 How. 421 Ann. Cas. 1918A, 234; Mattox v. United States, 156 U.S. 242, 15 S.Ct. 337, 39 L.ed. 409; State v. Weil, 83 S.C. 478, 65 S.E. 639, 26 L.R.A. (N.S.) 461."

And further said:

> "When the right of cross-examination is denied the accused, whether by reason of death of the witness or otherwise, his testimony in chief becomes incompetent." Citing text books and cases.

In *United States v. Keown, 19 F. Supp. 639*, the court passed upon the question as to whether an officer who made a search based upon information received, could be cross-examined, as to the source thereof, and held that a denial thereof constituted a violation of due process of law. The court emphasized the importance of the question, and cited the conflict of authority, and that this Court refused to

pass upon it in two cases, *Husty v. United States, 282 U.S. 694*, and *Segurola v. United States, 275 U.S. 106*, because of certain procedural grounds. That as neither ground is applicable hereto, it is hoped this Court will grant the Writ and settle the question. That court in concluding it was error to have sustained the search, and in not requiring the arresting officer to divulge the name of his informant, held that such denied defendant the right to cross-examine the witness, which right has found expression in the Sixth Amendment to the Constitution, and with respect thereto, said:

> "The officer may use the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information.
>
> "In the case here, the officers could have pursued the automobile until, from the conduct of the driver or a disclosure of the contents of the car, sufficient facts could have been ascertained to have legally made the search and arrest. Under such a state of facts, it would have been immaterial as to who the informer was, or from what source the officer obtained his information.
>
> "Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Strakie on Evidence (2d Ed.) Vol. 1, page 160.

"When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material to his offense in a criminal prosecution, and sometimes the departments of government will be put to a choice of either foregoing a criminal prosecution or disclosing the source of material information necessary to the conduct of orderly judicial procedure.

"The real ground of Agent Witherspoon's refusal to disclose the name of his informant was that he had been instructed by his superior officers to withhold such information. He should not be held in criminal contempt for failing to disclose the name of his informer. The better way to reach the question is to compel the United States to forego the use of the testimony by the agent favorable to it, unless willing to submit to a ful lcross-examination."

In the Keown case, the court cited *United States v. Blich, 45 F. (2d) 627* wherein the court pointed out that it was incumbent upon the witness to sustain his motives and his beliefs by all the evidence at his command, and cannot be "safely ensconced behind his blanket testimony that he was informed by a reliable person" (p. 645). The court also cited *Wilson v. United States, 3rd, Cir. 59 F. (2d) 390* wherein was involved a question as to whether

evidence obtained by a search and seizure should be suppressed, in a proceeding ancillary to a criminal prosecution. The witness refused to divulge the name of the member of the club who he said gave him a key to th epremises he searched, and the District Court admonished him to do so, and upon his failure to do so, was committed for contempt. The Circuit Court of Appeals sustained the action of the District Court upon the ground that such evidence was essential to the proper disposition of the case.

C. The Motion Requiring Election.

The indictment included four counts, the first a conspiracy to acquire marihuana in Mexico, unlawfully import it into the United States, and thereafter to transport it to a certain destination to unlawfully sell it, the second unlawfully importing marihuana, the third, the unlawful receipt and concealment thereof, and the fourth, the unlawful acquiring marihuana within the United States. The prosecutor no doubt charged the unlawful acquiring marihuana within the United States as an alternative charge to meet the evidence, but, as only one package of marihuana was involved, and which according to the thirteenth overt act to the conspiracy charge, was possessed by petitioner Cannon in his car (where it was seized) transporting it in furtherance of the object of the conspiracy as having acquired it in Mexico, imported it, and then transporting it to destination for sale, and if such were so, then petitioners could not have acquired the marihuana within the United States. They were either guilty under the evidence of either charge, and not both, therefore it was error

of the Trial Court in overruling the motion to elect between these counts made at the close of all the evidence.

D. Motion for Judgment of Acquittal.

The Court of Appeals appreciated, that under the ruling of this Court in *Anderson v. United States, 318 U.S. 350*, and *Glasser v. United States, 315 U.S. 60*, if the search be held unlawful, the conviction of both petitioners would follow, but held the search lawful.

For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court and its affirmance of said judgment by the Court of Appeals should be reversed, and a new trial awarded by this Court.

Respectfully submitted,

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 991

EDWARD S. CANNON AND CHARLES SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 250–253) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1946 (R. 254). A petition for rehearing was denied January 22, 1947 (R. 260). The petition for a writ of certiorari was filed February 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was probable cause for the search of an automobile driven by petitioner Cannon.

2. Whether the trial court properly ruled that a government inspector, testifying on a motion to suppress evidence as to probable cause for a search, could not be cross-examined as to the identity of his confidential informant.

3. Whether petitioners could properly be convicted of conspiracy unlawfully to import and acquire marihuana and of the substantive offense of acquiring marihuana without the required official order form.

STATUTE INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 554, as reenacted in the Internal Revenue Code, 53 Stat. 279 ff., 26 U. S. C. 2590 ff., provides in pertinent part as follows:

> SEC. 2593 (a). It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand

by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

STATEMENT

Petitioners were convicted on the first and fourth counts of a four-count indictment against them and two others in the United States District Court for the Southern District of Texas (R. 5–13, 241–242). The first count charged conspiracy to violate the customs laws by unlawfully importing marihuana into the United States and to violate the Marihuana Tax Act by importing marihuana and unlawfully receiving the transfer of marihuana without an official order form required by law (R. 5–11). The fourth count charged a substantive violation of the Marihuana Tax Act in that petitioners unlawfully acquired marihuana without having paid the tax required by law and possessed marihuana which had been transferred without the written order form provided for that purpose by the Secretary of the Treasury (R. 12–13). Petitioner Cannon was sentenced to imprisonment for two years on the first count and eighteen months on the fourth, the sentences to run consecutively (R. 243–244). Petitioner Smith was sentenced to imprisonment for two years on each of counts 1 and 4, the sentences

to run consecutively (R. 244–245). On appeal the judgments were affirmed (R. 254).

The principal question raised by petitioners relates to the admissibility of a sack of marihuana seized by customs agents after a search of an automobile driven by petitioner Cannon. Cannon moved before trial to suppress such evidence (R. 14–17), and after a hearing, his motion was denied (R. 18–33). The customs inspectors who made the search also testified at the trial to the circumstances leading up to the search (R. 34–54, 73–89), and defense counsel objected to the admissibility of evidence relating to the finding of the marihuana, but such objections were overruled (R. 50–51, 85–86, 213).

The evidence adduced on this issue may be summarized as follows:

United States customs inspectors were told by an informer, who had previously proved to be reliable, that petitioners were to be in Nuevo Laredo, Mexico, on January 16, 1946, for the purpose of obtaining marihuana, and that they would have a large gunnysack containing the marihuana (R. 25–26, 28). On the morning of January 16, the agents followed petitioners and the two other persons named as defendants and saw them turn into a tourist court at the north limits of Laredo, Texas (R. 35–37). Shortly after 2:30 p. m., the four defendants left the tourist court in a black Mercury sedan driven

by petitioner Smith (R. 37). The agents lost sight of the car when a passing railroad train blocked their view (R. 37–38).

At about 7 o'clock that evening, the agents noticed the black Mercury sedan about a block from the International Bridge (R. 38, 78). They went to the port of entry and observed the four defendants walking across the International Bridge from Nuevo Laredo (R. 25, 40, 78–79). They saw the four defendants get into the Mercury and followed them as they drove off (R. 41–42, 79–80). Petitioner Cannon left the car and the others drove on to a parking lot (R. 41–42, 79–80). Later the agent saw Cannon talking to the other defendants at the parking lot (R. 81). When the Mercury driven by Smith left the lot, it was followed by petitioner Cannon driving an old Studebaker (R. 43, 81). The Mercury was driven to the tourist court where the defendants had been seen that morning, and the Studebaker was parked for a short time about 200 yards away (R. 44, 82). Subsequently, Cannon drove off and later drove the Studebaker into the tourist court (R. 45, 46, 83).

At about 10 o'clock in the evening, the Mercury driven by Smith headed north (R. 47–48, 83). It was stopped and searched but no contraband was found (R. 48, 85). The inspectors then turned back toward Laredo and saw the Studebaker driven by Cannon headed north (R. 50, 85).

They stopped the car, searched it, and found in the rear trunk a large gunnysack of marihuana (R. 21, 32, 50–51, 86–87). They then arrested Cannon (R. 21, 32, 87).

At the hearing on the motion to suppress, the trial judge sustained the Government's objection to defense counsel's question concerning the identity of the confidential informant (R. 26).

ARGUMENT

1. Petitioners contend (Pet. 5–6, 9–10, 16–20) that the marihuana found in Cannon's automobile was inadmissible in evidence on the ground that the Government had failed to establish probable cause for the search of the automobile. They rely on two district court cases which hold that information obtained from an undisclosed informer is not in and of itself sufficient to establish probable cause. *United States* v. *Blich,* 45 F. 2d 627 (D. Wyo.); *United States* v. *Keown,* 19 F. Supp. 639 (D. Ky.). As the court below pointed out, however (R. 253), the decisions in the circuit courts of appeals are to the contrary. *United States* v. *Li Fat Tong,* 152 F. 2d 650 (C. C. A. 2); *King* v. *United States,* 1 F. 2d 931 (C. C. A. 9); *McInes* v. *United States,* 62 F. 2d 180 (C. C. A. 9), certiorari denied, 288 U. S. 616.

Furthermore, even if the district court decisions relied upon by petitioners were correct, they would not be controlling here. For in this case the search was based, not solely upon the infor-

mation received from the informer, but on that information as corroborated by observations of petitioners' actions. While the acts of petitioners as observed by the agents might not alone have been sufficiently suspicious to constitute probable cause for a search, such acts did tend to confirm the information received from the informer and, considered together with such information, were such as to lead a reasonable man to believe that petitioners were transporting marihuana. The situation is very similar to that before this Court in *Scher* v. *United States,* 305 U. S. 251, where a search initiated as a result of confidential information was sustained. The facts stated by this Court (p. 253) indicate that the actions observed by the officers might not in themselves have been suspicious without the light thrown on such actions by the confidential information theretofore received. See also *Husty* v. *United States,* 282 U. S. 694, where the flight of two men after a car was stopped, together with information received from a confidential informer, was held sufficient to justify the search of an automobile. This Court there said (pp. 700–701):

> * * * To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States,* 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his

> attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. * * *

2. Petitioners' contention that the trial court erred in refusing to permit Cannon to cross-examine the agent in respect of the identity of his confidential informer (Pet. 5, 6, 7–9, 20–24), is without merit. It is established that such information need not be disclosed unless essential to the defense. *Scher* v. *United States,* 305 U. S. 251, 254, and cases cited; see also *United States* v. *Li Fat Tong,* 152 F. 2d 650 (C. C. A. 2). And since, as we have shown, the search here was based not on the informer's disclosures alone, but on such information as corroborated by observation of petitioners' actions, the identity of the informer was not a vital matter in establishing good faith on the part of the officers.

3. Petitioners' final contention that the Government should have been compelled to elect whether to proceed on the first or the fourth count of the indictment (Pet. 5, 7, 10–11, 24–25) is untenable. They argue that there was a fatal inconsistency between the charge in the first count of a conspiracy to acquire marihuana in Mexico and import it into the United States, and the charge in the fourth count of unlawful acquisition of marihuana in the United States. However, the first count charged a conspiracy, not only to im-

port marihuana, but to acquire it unlawfully after importation. In fact the indictment specifically set forth (R. 7–8) that—

> * * * divers other persons to the Grand Jurors unknown, pursuant to the foregoing arrangement and agreement with the defendants herein, were to unlawfully smuggle and clandestinely import and bring in and introduce said marihuana into the United States of America, and in particular the Laredo Division of the District of Texas, from the Republic of Mexico, without declaration and entry of said marihuana as provided by the Customs Laws of the United States, and said defendants were then to receive transfer of, conceal and assist in receiving and concealing said marihuana in the United States of America, and in particular the Laredo Division of the Southern District of Texas, and said defendants were to receive and transport and facilitate the transportation of said marihuana to the City of New Orleans, State of Louisiana, and defendants were thereafter to sell, transfer and assist in selling and transferring said marihuana to divers persons to the Grand Jurors unknown, * * *

There was thus no inconsistency between the conspiracy charged in the first count and the substantive offense charged in the fourth. Petitioners could, of course, properly be convicted of both conspiracy and a substantive offense.

Pinkerton v. *United States*, No. 719, O. T. 1945, decided June 10, 1946.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 991

EDWARD S. CANNON and CHARLES SMITH,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

American Printing Co., Ltd., 424 Camp Street

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PETITION FOR REHEARING

Comes now the above named petitioners, Edward S. Cannon and Charles Smith, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

The Circuit Court of Appeals for the Fifth Circuit, has decided two questions of general importance, and in conflict with other Circuit Courts of Appeals and District Courts. The lower court holds herein that an officer can forcibly stop and search a car on a public highway, solely upon hearsay information, and in a proceeding to suppress the evidence heard before trial, the officer cannot be compelled to divulge the source of such information. In so hold-

ing, the lower court is in conflict with what this Court has indicated as required to establish probable cause, that is "circumstances known to the seizing officer," *Carroll v. United States, 276 U. S. 132*, and in conflict with the following Circuit Courts of Appeals:

The Fourth Circuit, in *Elrod v. Moss, 278 F. 123*, said:

> "Under the federal as well as state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused."

The Seventh Circuit, in *Lawson v. United States, 9 F. (2d) 746*, said:

> "* * probable cause must be determined by the existence of facts known to the officer before, * * *" (p. 746)

The Circuit Court of Appeals for the Sixth Circuit, in *Wisniewski v. United States, 47 F. (2d) 825*, therein recognized that information received "may have amounted to no more than ground for suspicion * * *". But therein held that the circumstances within the personal knowledge of the officers confirmed the information, and sustained the search, citing *Husty v. United States, supra*, wherein this Court sustained the search because the circumstances known to the officers, confirmed the information before the search.

In *United States v. Li Fat Tong, 2nd Cir., 152 F. (2d) 650*, and *King v. United States, 9th Cir., 1 F. (2d) 931*, cited by the lower court herein, do not sustain the holding

that probable cause to authorize search without warrant can exist upon hearsay information alone. In both those cases, the circumstances known to the seizing officers before the search, confirmed the information, and the courts therefore sustained the searches. The lower court is therefore alone in holding that:

> "We are also in no doubt that the testimony of the officers, that they had information which they believed was reliable, was sufficient *in itself* to justify the search." (Emphasis ours) 158 F. (2d) 952, 954.

The lower court has ruled herein as the law of the Fifth Circuit, in conflict with other circuits, that hearsay information is, of itself, sufficient to authorize a forceful search of an automobile on a public highway, and has further ruled that the seizing officer who testifies against the accused, cannot be compelled to divulge the source of his alleged information. Does not such ruling destroy the purpose and effect of the Fourth Amendment, by granting to officers an unlimited and arbitrary power to make searches and seizures in disregard to Constitutional limitations, in order to obtain the arrest of a violator of the Federal laws? Then too, is not a refusal to permit the accused in a proceeding to suppress evidence, a proceeding ancillary to the criminal prosecution, the right to cross-examine the arresting officer as to the source of his alleged information, in order that the court may have the benefit of same in determining whether probable cause existed for the search, and to afford the accused opportunity of testing the veracity of the officer, and whether he was justified in relying on such information if so received by him, a violation of the accused right to due process of law under the Sixth Amendment?

The decision of the Fifth Circuit herein holding such information may be withheld, is in conflict with the Second and Third Circuit Courts of Appeals, and certain United States District Courts, and also does not such ruling deprive the accused of due process of law as provided by the Sixth Amendment?

In *United States v. Heitner, 2nd Cir., 149 F. (2d) 105*, the court therein said as to compelling disclosure of source of information in making an arrest, said:

> "It is true that, when they act upon information, it is proper to compel them to disclose its source—subject to some limitations—since otherwise there is no way to test whether they have had 'reasonable cause' for the arrest. * *" (pp. 106, 107)

The United States Circuit Court of Appeals for the Third Circuit, in *Wilson v. United States, 59 F. (2d) 390*, held contrary to the Fifth Circuit herein, that where a search is dependent upon information received, the source of such information must be revealed. The court therein held that while public policy forbids disclosure of confidential information, there is an exception to such rule where what is asked is essential to the proper disposition of the case, and with respect thereto, said:

> "The question here at issue was whether the evidence secured by a search and seizure should be suppressed. The proceeding was ancillary to a criminal prosecution against the Delaware league. The witness had testified that he had procured access to the rooms of the league on the invitation of a member, who had supplied him with a membership card, a key, and a plan of the building. If these means of access had not been sup-

plied by a member, but had been unlawfully obtained, the evidence secured should be suppressed. Fraternal Order of Eagles v. United States (C. C. A.) 57 F. (2d) 93. To determine this, the information sought could not be withheld. The evidence was 'essential to the proper disposition of the case,' and, in consequence, admissible, and, being admissible, the witness could not withhold it. Upon his refusal to testify he was properly adjudged to be in contempt, and an order of commitment properly followed." (p. 392).

In *United States v. Keown, 19 F. Supp. 639*, the court held that confidential information could be used in detecting facts and circumstances which may give rise to grounds for a search without warrant, and if so, the source of such information is immaterial and need not be divulged. But that the government cannot place a witness on the stand whose testimony is based on an informer, and deprive the accused the right to cross-examination as to the source of such information. The court therein held to do so, is a deprivation of due process of law under the Sixth Amendment. See also State v. Bigham, 133 S. C. 491, 131 S. E. 903. In the *Keown* case the court referred to the conflict between courts on the subject, and because of the importance thereof, emphasized the necessity of a uniform ruling.

In *Segurola v. United States, 1st Cir., 16 F. (2d) 563*, the court sustained the ruling of the lower court that to divulge confidential information as to its source, is against public policy, but, the court sustained the search, not, as in the instant case, on hearsay information alone, but because as the court therein said:

"On this record there was, therefore, apart from any confidential communication, abundant evi-

> dence of probable cause for the seizure under the principles in the Carroll Case, supra."

Certiorari was granted 275 U. S. 106, but this Court avoided decision on the question as to the confidential nature of the testimony for the reason that proper objection and exceptions had not been taken in the lower court, and further, that the motion to suppress came too late. And in *Husty v. United States, 282 U. S. 694*, the arresting officer was asked the name of his informer, but refused to answer, and was not required to do so by the lower court, and this Court refused to rule on the competency of the question, and on this subject said: "In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Circuit Court of Appeals (48 F. (2d) 1076), and it does not appear that they were presented or passed upon there. *Guigan v. United States, 274 U. S. 195, 200, 47 S. Ct. 566 (568).*"

In *Scher v. United States 305 U. S. 251*, counsel for defendant undertook to question the arresting officers relative to the source of the information which led them to observe the defendants' actions. Objections to these questions were sustained, and such was assigned as error to this Court. As to this, this Court said:

> "In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence.

Justification is not sought because of honest belief based upon credible information as in United States v. Blich (D. C.) 45 F. (2d) 627."

In the above case this Court considered that the source of the information was unimportant to petitioner's defense, as the validity of the search "did not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence." But, in the instant case, as in *United States v. Blich (D. C.) 45 F. (2d) 627*, cited by this Court in the above opinion, the validity of the search did, upon the ruling of the court, depend upon the credibility of something allegedly told the officers. In the instant case the officer testified that the cause of the search was:

"Q. What was the cause of it?

"A. We had information the he was to —.

"Q. What information did you have?

"A. That he was to have contraband in his car." (R. 25)

Nothing took place in the presence of the officers to justify the search. And while the lower court held that in addition to the information there were circumstances which made the search reasonable, citing *Scher v. United States, supra*, such is not sustained by the evidence. In the *Scher* case the officers saw and heard sufficient to justify them in believing the credibility of their information, and, in addition thereto, before the search was made, the driver of the car admitted possession of whiskey in his car, and consequently the source of the officer's information, as stated by this Court was immaterial. But, in the instant case,

nothing was observed by the officers to warrant them, as prudent men in believing petitioners were in the act of transporting marihuana, they merely acted on information. This is not disputed in the evidence. The officer admitted that when they saw petitioners' car pass them on the highway, it was their intention to stop it, and search it. (R. 32). They neither saw nor heard anything to confirm the alleged information. As to this, in the brief in opposition to the petition herein, no attempt is made to sustain the search without the alleged information. As to this, we quote from the brief as follows:

> "While the acts of petitioners as observed by the agents might not alone have been sufficiently suspicious to constitute probable cause for a search, such acts did tend to confirm the information received from the informer and, considered together with such information, were such as to lead a reasonable man to believe that petitioners were transporting marihuana." (p. 7)

And counsel for the government urge that this Court in the *Scher* case did "indicate that the actions observed by the officers might not in themselves have been suspicious without the light thrown on such actions by the confidential information theretofore received." (p. 7) But this Court therein specifically held that the actions observed by the officers, and what they heard, were alone sufficient to justify the search. The *Scher* case is, in no respect, parallel to the instant case.

That the search in the instant case is sustained by the lower court solely upon the alleged information received by the officers, is made clear by the ruling of the lower court in the case of *Medina v. United States, 158 F. (2d) 955,*

submitted the same date, wherein the court, in a *per curiam* decision, citing their opinion in the instant case, said:

> "The evidence in each of the cases establishes without contradiction that the search and seizure was made on information believed by the customs officers, who made the search and seizure, to be reliable. It is settled law that such information will support a finding that a search of an automobile based upon it was not unreasonable."

In *United States v. Blich (D. C.) 45 F. (2d) 627*, the court held that an agent making a search of an automobile without a warrant, on information, must reveal the source of the information, to sustain his motives, and cannot be "safely ensconced, behind his blanket testimony that he was informed by a reliable person."

And, we submit, for the court to hear the testimony of the arresting officer that he made the forceful search without a warrant, and upon alleged information received, and to consider such information as probable cause for the search, and to refuse the accused the right to cross-examine the officer as to the source of the alleged information, is a deprivation of the right of accused under the Sixth Amendment. *State v. Bigham, 133 S. C. 491, 131 S. E. 603*; *United States v. Keown, supra.*

It is respectfully submitted that the two questions above presented are each of such importance to the enforcement of federal laws, that calls for a review thereof by this Court for a uniform ruling thereon.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that a Writ of

Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case number and style on its docket, "*Edward S. Cannon and Charles Smith, appellants, vs. United States of America, appellee, Number 11,675*", to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I, M. A. Grace, counsel for the above-named petitioners, do certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Petitioners.

I, M. A. Grace, do certify that copy of the foregoing petition was mailed, postage prepaid, to Honorable George T. Washington, Acting Solicitor General, Washington, D. C.

Counsel for Petitioners.